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Atlantic Veal & Lamb, Inc. and Knitgoods Workers' Union, Local 155, Union of Needletrades, Industrial & Textile Employees, AFL-CIO. Cases 29-CA-024484, 29-CA-024619, and 29-CA-024669

June 27, 2012

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES AND GRIFFIN

On July 16, 2010, Administrative Law Judge Raymond P. Green issued the attached second supplemental decision. The Acting General Counsel filed exceptions and a supporting brief. The Respondent filed cross-exceptions with a supporting brief and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the second supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Second Supplemental Decision and Order.

Introduction

On June 30, 2004, the Board issued the underlying decision in this case, finding, in relevant part, that Respondent Atlantic Veal & Lamb, Inc. had unlawfully discharged employee George Ogando. As a result of this unfair labor practice finding, the Board ordered the Respondent to reinstate Ogando to his former position or, if that position no longer existed, to a substantially equivalent position. The Board also ordered the Respondent to make Ogando whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful actions. The Board's Decision and Order was subsequently enforced by the United States Court of Appeals for the District of Columbia Circuit.¹

Following the issuance of a compliance specification and a hearing, the judge issued a supplemental decision on July 16, 2010, denying Ogando backpay from the date of Ogando's discharge, August 28, 2001, until June 7, 2004. The judge found that Ogando had, on a mortgage application, claimed employment and earnings for that period that he had failed to report to the General Counsel. The judge decided that it was impossible to determine Ogando's actual wages for that period, and he

therefore declined to award any backpay for it. The judge did, however, order that the Respondent make Ogando whole for the period from June 7, 2004, until such time as the Respondent makes Ogando a valid offer of reinstatement.² Both the Respondent and the General Counsel filed exceptions to the judge's decision.

On May 28, 2010, the Board issued a Supplemental Decision and Order³ in which it adopted the judge's recommended backpay order for the period beginning June 7, 2004, and continuing until the Respondent makes Ogando a valid offer of reinstatement.⁴ The Board, however, found that the judge erred in failing to make specific findings regarding Ogando's credibility and his interim earnings from the date of his discharge until June 7, 2004. The Board severed that portion of the case and remanded it to the judge so that he could reconsider the evidence, make credibility determinations, and make and explain his findings regarding Ogando's earnings for the specified period.

On July 16, 2010, the judge issued the attached second supplemental decision. First, the judge found that Ogando was entitled to backpay in the amount of \$3440 for the period of November 1, 2001, through December 31, 2001. Second, the judge found that Ogando was not entitled to backpay for the period of January 2002 until June 7, 2004. In so finding, the judge discredited Ogando's testimony that he had little or no income in 2002 and 2003. The judge also discredited the testimony of Angel Diaz that Ogando did not work for him at Royal Quality General Construction or Royal Roofing during that time. Although he does not so state with any clarity, the judge appears to have found that Ogando had worked for Diaz in 2002-2003 and would have continued to do so until he was hired by Whole Foods on June 7; thus, the judge also denied Ogando backpay for the first and second quarters of 2004.

For the reasons stated below, we find that the judge erred by beginning Ogando's backpay on November 1, 2001, and by failing to calculate overtime pay for the fourth quarter of 2001. In addition, we find that the judge erred by finding that the Respondent met its burden to show that Ogando is disqualified from receiving backpay for 2002, 2003, and the first and second quarters of 2004.

² On June 7, 2004, Ogando began working for Whole Foods. The judge found that Ogando's interim earnings at Whole Foods were not in dispute.

³ *Atlantic Veal & Lamb, Inc.*, 355 NLRB 228 (2010).

⁴ The Board found that an offer of reinstatement to Ogando will not be valid unless it: (1) raises Ogando's pay rate to what it would have been but for the illegal discharge; (2) offers him an opportunity to participate in its health insurance plan; and (3) provides him the proper amount of vacation pay.

¹ *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418 (2004), *enfd.* per curiam 156 Fed. Appx. 330 (D.C. Cir. Oct. 27, 2005).

Analysis

1. Fourth quarter 2001

The judge found that Ogando was entitled to backpay in the amount of \$3440 for the period of November 1, through December 31, 2001. Both the Respondent and the Acting General Counsel excepted to the judge's finding. The Respondent makes two arguments. First, it argues that Ogando should be disqualified from receiving backpay in 2001 because he did not mitigate his losses. In the alternative, the Respondent argues that Ogando should receive at most 6 weeks of backpay for 2001 because his testimony indicates that he did not start looking for work until mid-November. The Acting General Counsel's exception is limited to the judge's failure to consider overtime in the calculation of backpay for this period.

To begin, we find that the evidence does not support the Respondent's argument that Ogando failed to mitigate his damages in 2001. But we find merit in the Respondent's alternative argument—that the backpay period did not commence on November 1, 2001, because, on that date, Ogando had not yet begun searching for work. As set forth above, the date of Ogando's unlawful discharge was August 28, 2001. Although the record does not indicate an exact date that Ogando began searching for work, Ogando testified that his job search began in "mid-November." Consistent with *Grosvenor Resort*, 350 NLRB 1197 (2007), because Ogando did not begin searching for work within 2 weeks of his unlawful termination, the commencement of the backpay period is tolled until the time that his search for work actually began. Based on Ogando's testimony, we find that Ogando began his search for work on November 15, 2001. Thus, for 2001, Ogando is entitled to backpay for only the last 6 weeks.

We also find merit in the Acting General Counsel's exception to the judge's failure to include overtime in the backpay calculation for that 6-week period. In its supplemental decision, the Board adopted the Acting General Counsel's formula for calculating backpay, pursuant to which Ogando is entitled to backpay at \$10.75 per hour, plus overtime. The backpay specification indicates, and it is uncontested, that during the fourth quarter of 2001, comparable employees worked an average of 14.69 hours of overtime per week. Thus, the amount owed Ogando for overtime is \$666.84 per week. Accordingly, we find that Ogando is owed an additional \$4,001.04 for the last 6 weeks of 2001.

2. 2002, 2003, and 2004

The Acting General Counsel has excepted to the judge's finding, on remand, that Ogando was not entitled

to backpay for 2002, 2003, and the first two quarters of 2004. As stated above, the judge discredited Ogando's assertion that he had little or no income in 2002 and 2003; the judge also discredited Angel Diaz, who testified that Ogando did not work for Diaz' companies—Royal Quality General Construction or Royal Roofing—during the backpay period. Based on those credibility resolutions, the judge appears to have found that Ogando had worked for Diaz in 2002–2003 and that he would have continued to do so until he was hired by Whole Foods in June 2004. The judge's credibility findings are based on a W-2 and two pay statements from Royal Quality Construction that were submitted to a bank, by or on behalf of Ogando, to obtain a mortgage. The General Counsel urges that the Board not adopt the judge's credibility findings, asserting that Ogando's tax returns from 2002–2004 establish that he earned less than the amount indicated on the W-2 and pay statements from Royal Quality Construction.

We find it unnecessary to pass on the judge's credibility determinations because, even accepting those determinations, we find that the Respondent did not meet its burden to show that Ogando had additional earnings in 2002, 2003, and the first two quarters of 2004 that he failed to report to the Board. As explained below, we reverse the judge's finding that Ogando is disqualified from receiving backpay for that period.

The judge found that, because the W-2 and pay statements submitted to the bank disclose that Ogando had higher earnings in 2002–2003 than he reported to the Board, the Respondent met its burden to show that Ogando had higher earnings than he reported to the General Counsel. We disagree. Although the judge discredited Ogando, he did not make any affirmative findings of fact regarding Ogando's interim earnings for 2002, 2003, and the first half of 2004.⁵ This is unsurprising, as other findings and evidence cast doubt on the issue of Ogando's earnings during this period. As the judge acknowledged in footnote 3 of his decision, the documents submitted to the bank could have been forgeries created by Diaz and Ogando to secure a larger mortgage than Ogando would have otherwise qualified for.⁶ Addition-

⁵ *Parts Depot* and *American Navigation*, relied on by our dissenting colleague, are distinguishable. In both of those cases, the Board made an affirmative finding that the discriminatee had concealed earnings from the Board. See *Parts Depot*, 348 NLRB 152, 153 (2006), enf'd, 260 Fed. Appx. 607 (4th Cir. 2008); *American Navigation Co.*, 268 NLRB 426, 428–429 (1983). The judge made no such finding here, and the record does not support one.

⁶ The judge surmises that, if the record had been reopened, Ogando and Diaz might have testified that they participated in a "fraudulent scheme with the realtor to obtain money from a bank." The judge's speculation about what Ogando's testimony might have been is mis-

ally, and not addressed by the judge, Ogando's tax returns, adduced by the General Counsel, directly conflict with the mortgage documents and report lower interim earnings.⁷

In a compliance proceeding, the burden is on the Respondent to show that the discriminatee had interim earnings that he concealed from the General Counsel. *Cibao Meat Products*, 348 NLRB 47, 48 (2006). Here, there is no doubt that Ogando lied to someone about his earnings. The question, however, is whether the Respondent has met its burden of showing that he lied to the Board. See *id.* (even assuming arguing that the discriminatee deliberately misled third parties, that would not "operate to reduce the [r]espondent's obligation to remedy its unfair labor practice"). As set forth above, the evidence in the present case creates no more than an unresolved doubt as to whether Ogando concealed earnings from the General Counsel, and doubt alone will not suffice to satisfy the Respondent's burden. See *United Aircraft Corp.*, 204 NLRB 1068 (1973) (uncertainties should be resolved in favor of the "backpay claimant rather than the respondent wrongdoer"); accord: *Cibao Meat Products*, *supra*.⁸

Accordingly, we reverse the judge and find that the Respondent failed to establish that Ogando concealed income from the General Counsel for any quarter of the backpay period. Further, we find that Ogando is entitled to backpay in the amount set forth in the second amended compliance specification for 2002, 2003, and 2004.

ORDER

The National Labor Relations Board orders that the Respondent, Atlantic Veal & Lamb, Inc., New York, New York, its officers, agents, successors, and assigns shall make George Ogando whole for the period from November 15, 2001, until June 7, 2004, by paying him the amount following his name, plus interest accrued to the date of payment, as prescribed in *New Horizons for*

the Retarded, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws:

George Ogando \$74,461.37

Dated, Washington, D.C. June 27, 2012

Mark Gaston Pearce, Chairman

Richard F. Griffin, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting in part.

It is undisputed that discriminatee Joerge Ogando must be denied backpay for each quarter in which he concealed interim earnings from the Board. *Parts Depot, Inc.*, 348 NLRB 152, 153 (2006), *enfd.* 260 Fed.Appx. 607 (4th Cir. 2008); *American Navigation Co.*, 268 NLRB 426, 428–429 (1983). At an earlier stage in this compliance proceeding, the Board remanded the case to the administrative law judge for the specific purpose of making necessary credibility findings about Ogando's interim earnings claims.¹ Based on the judge's decision, my colleagues acknowledge that Ogando lied about his earnings "to someone." They nevertheless award him more than \$70,000 in backpay because, in their view, there is "an unresolved doubt" whether he lied about the amount of interim earnings to the Board or instead lied to others in order to obtain a mortgage and employment. I disagree. The judge having discredited evidence supporting Ogando's version of events, the Respondent has shown by a preponderance of the credited evidence that Ogando lied to the Board about his interim earnings for 2002, 2003, and the first two quarters of 2004. I would therefore affirm the judge's determination that he is not entitled to any backpay for that period.²

The only interim earnings Ogando reported to the Board for the relevant period was from sporadic self employment in light construction. His tax returns also show this income. However, a mortgage application he submitted in 2003 showed he was employed by Royal Quality General Construction or Royal Roofing during this period with annual earnings of more than \$60,000. A job application that he subsequently submitted to Whole

placed, however, in light of Ogando's express, uncontested testimony at the compliance hearing that the documents submitted in support of the mortgage were fraudulent.

⁷ Contrary to our dissenting colleague's argument, we are not giving dispositive weight to Ogando's tax returns. Rather, we find that, although the judge relied on the mortgage documents to discredit Ogando and Diaz, the judge failed to reconcile those documents with Ogando's tax returns. Thus, the Board is left to interpret conflicting documentary evidence.

⁸ As the Board stated in *Cibao*, "[a]lthough we acknowledge the obvious discrepancies [in the documentary] evidence, we do not believe that the mere existence of such discrepancies suggests willful concealment. More importantly, the Respondent, who bears the burden of proof on this matter, has not shown that the above discrepancies reflect willful concealment of earnings from the Board." See *Atlantic Limousine, Inc.*, 328 NLRB 257, 257 (1999) (citing *Paper Moon Milano*, 318 NLRB 962, 963 (1995)). *Id.* at 48 (emphasis in original).

¹ *Atlantic Veal & Lamb, Inc.*, 355 NLRB 228, 229 (2010).

² I join in my colleagues' finding that Ogando is owed \$4,001.04 for the last 6 weeks of 2001.

Foods also showed this employment, plus additional employment with Jerry's Grocery. The record also includes W-2 forms from Royal Quality and a check from Jerry's Grocery that are consistent with these statements. The record therefore contains evidence of two jobs Ogando held in the relevant period, while Ogando reported interim earnings only from his self employment. Absent contradiction by credible evidence, this documentary evidence meets the Respondent's burden of proving that Ogando willfully concealed earnings from the Board.

There is no credible contradictory evidence. To be sure, Ogando testified that the documents showing concealed earnings were false, and his friend, Royal Quality Owner Angel Diaz, gave supporting testimony. The Board remanded this case specifically to allow the judge to address the credibility of this testimony, stating that that "if the judge actually determined that, despite Ogando's denial, he, in fact, had significant income in 2002 and 2003 not reported to the Board, then *Parts Depot* would call for the curtailment of Ogando's backpay in those relevant quarters."³ The judge made that determination, but the majority awards backpay to Ogando anyway.⁴ Their reasons for doing so do not withstand scrutiny.

The majority first asserts that the judge made no affirmative findings regarding the amount of Ogando's interim earnings during the relevant period. But no such finding was required. *American Navigation Co.*, supra at 428, 430-431 (1983) (backpay denied based solely upon a finding of deliberate concealment even though actual interim earnings could not be ascertained). Indeed, deliberate concealment was found under strikingly similar circumstances in *Parts Depot*, supra (backpay claimant listed in a job application interim employment not reported to the Board; her testimony that it was fictitious employment listed to obtain a loan discredited by judge despite lack of tax documents supporting existence of job).

My colleagues also note the judge's surmise that the documents showing concealed interim earnings could have been forgeries created by Diaz and Ogando to obtain a mortgage. But the judge concluded that "the record does not show that this was the case." Therefore, contrary to the majority, the judge did not "cast doubt" on his own finding that the Respondent met its burden of showing willful concealment of higher earnings than those reported to the Acting General Counsel.

Finally, the majority notes that Ogando's tax returns, which the judge did not mention, are consistent with the interim earnings he reported and contradict the evidence of concealment. I disagree. As the Board recognized in *Parts Depot*, supra at 157, under the table employment is not an unheard of phenomenon. Ogando's tax returns were before the judge on remand when he made his credibility determinations. The judge's discrediting of Ogando's testimony necessarily extended to discrediting the accuracy of tax returns prepared by him. Further, the tax returns are specifically contradicted by other documentary evidence, and the discredited testimony is the only basis for finding the returns to be dispositive. My colleagues' decision to give the tax returns dispositive weight is inconsistent with the purpose of the Board's remand and the resultant credibility findings.

Moreover, this is not a situation where Ogando must either have lied to the Board and the Internal Revenue Service or lied to a mortgage lender and potential employer. Assuming arguendo, as my colleagues suggest, that Ogando did lie about his income to a bank, it is difficult to understand why this misconduct supports the veracity of his tax returns, and the backpay claim based on them. If he was willing to game the system by overstating income in order to obtain a bank loan, he could be just as willing to understate income in order to minimize his tax obligation or to maximize his backpay award.

The Respondent unlawfully discharged Ogando. I agree fully with the majority that this violation of the Act must be appropriately remedied and that mere uncertainty as to backpay should be resolved in favor of the backpay claimant rather than the respondent wrongdoer. While the majority acts in good faith and on the basis of a record we all wish was more conclusive, the evidence here meets the preponderance of the evidence standard for deliberate concealment under our precedent. Because my colleagues' backpay award departs from that precedent, I respectfully dissent.

Dated, Washington, D.C. June 27, 2012

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

Kathy Drew King Esq., for the General Counsel.

Steven B. Chesler Esq., for the Respondent.¹

³ 355 NLRB at 229.

⁴ Indeed, my colleagues find it "unnecessary" to pass on the very credibility determinations that the Board previously viewed as essential when it remanded this case.

¹ By letter dated June 17, 2010, Steven B. Chesler stated that he had been retained by the Respondent to represent it for the remainder of the proceedings.

SECOND SUPPLEMENTAL DECISION

RAYMOND P. GREEN, Administrative Law Judge. On May 28, 2010, the Board issued its Decision at 355 NLRB 228, remanding this case to me for further findings. Although the Board adopted certain findings, it remanded this matter in order to determine what if any backpay amounts are owed to George Ogando for the period from his discharge on August 28, 2001, until June 7, 2004.

The principle issue here is whether Ogando willfully concealed interim earnings or whether his testimony merely showed “discrepancies” resulting only in “mere suspicion and uncertainty.” A second and related issue would be whether the documentary evidence submitted by the Respondent, whether or not establishing “willful concealment,” nevertheless shows that Ogando had substantial interim earnings for the period in question so that his claim of net backpay for that period would be zero or at least far less than what is asserted by the General Counsel.

On June 4, 2010, I sent a letter to the parties requesting their positions on this matter. I also asked them to advise me as to whether they thought that the hearing should be reopened for further evidence. In pertinent part, I stated:

There was a conflict with the Ogando’s assertion that he never was employed by Royal Quality General Construction Inc. or any entity operated by Angel Diaz and the evidence that documentation such as W2 and income statements in the name of that company were submitted to a bank in connection with a sizeable mortgage given to him. Since it was stipulated that these documents were in fact submitted to the bank in relation to his loan application, (presumably with Ogando’s assent), it would be nice to know how and by whom these documents were created.

By letter dated June 16, 2010, the General Counsel advised me that it was her office’s opinion that no further hearings are called for or necessary.

The Respondent’s counsel, by letter dated July 9, 2010, advised me of his position regarding the remand; asserting that the record as it stands would support the conclusion that Ogando had substantial interim earnings for the period in question and did not tell the truth regarding those earnings. He also indicated that he “welcomes the opportunity to present additional testimony and evidence regarding these issues.” However, the Respondent did not identify any particular witnesses that it would call or identify what their testimony might be. In substance, the Respondent states that it would be useful to “track down the realtor that was assisting Ogando, Diaz and Rivera with the [house] purchase.”

It seems highly unlikely to me that the realtor could be located or that it would be possible, at this point in time, to ascertain how the loan documents were created. Therefore, I think that it would be futile to reopen the hearing.

As noted above, Ogando was illegally discharged on August 28, 2001. He testified that he did not start looking for work until November 2001 which is 9 weeks after his discharge. Ogando attributed his failure to look for work during this period because of the September 11, 2001, attack on the World Trade Center. I don’t really understand this contention and I

think that it is a nonsequiter. Despite the attack, the New York economy did not come to a halt and I can’t understand how he could conclude that no jobs were available and therefore that it would be future to look for work.

In *Grosvenor Resort*, 350 NLRB 1197 (2007), the Board held that discriminatees who fail to commence a search within the 2 week period after their discharge will not begin to accrue backpay until they commence a proper search. Even assuming that the Board may determine that 2 weeks is an unreasonably short period of time, Mr. Ogando’s 2 month delay in commencing his job search seems to me to be excessive. On this basis, I therefore will deny him backpay for the 3rd quarter of 2001 and for 5 weeks of the 4th quarter of 2001. Thus, for Quarter four of 2001, his gross backpay would be \$430 times 8 or \$3440. As his testimony that he had no interim earnings in 2001 was not challenged by any contrary evidence, his net backpay for that quarter would be \$3400.

The more serious question involves backpay for the period from the beginning of 2002 until June 7, 2004.

The Respondent introduced into evidence a W-2 form for Ogando that was submitted with a mortgage application for a house in Brooklyn, New York, that Ogando purchased in partnership with Angel Diaz. This W-2 form stated that for the year 2002, Ogando earned \$66,123 from a company called Royal Quality General Construction Inc., a company, alternatively called Royal Roofing, and which was owned by Angel Diaz. Angel Diaz was described as being a good friend of Ogando and given that relationship and their partnership in the purchase of the house, I would not view Diaz as being a disinterested witness. I also note that Diaz testified that he allowed Ogando to falsely assert that he was employed by his company when Ogando made a job application to Whole Foods.

The Respondent also introduced into evidence pay statements that showed that Ogando was issued two checks in 2003 from Royal Quality General Construction. These pay statements also stated that his year to date earnings were \$56,269.²

The General Counsel, after participating in a conference call with the bank that issued the mortgage, agreed that the above described documents were in fact submitted to the bank along with the mortgage application that was submitted by the real estate agent who arranged for the mortgage. I can only assume that the W-2 and pay statement documents that were submitted in support of the loan were submitted with the assent of Ogando.

Given the documentary evidence showing that Ogando had higher substantial interim earnings in 2002 and 2003, the Respondent therefore has met its burden of showing that the discriminatee had higher interim earnings than what was claimed by the General Counsel in the specification or what Ogando had originally told the General Counsel. The burden therefore shifts back to the General Counsel to rebut the Respondent’s showing of Ogando’s interim earnings.

Ogando denied ever working for Royal Quality General Construction and this was corroborated by Angel Diaz. But,

² In the original decision, I mistakenly asserted that the pay statements showed that Ogando’s pay was \$56,269.19 as of October 31, 2006. This should have been for October 31, 2003.

there is no dispute that the documents showing that he had substantial earnings from this company were submitted on his behalf to a bank in order for him to obtain a \$262,000 loan. Given these documents that had to have been submitted by him or submitted with his consent, I do not credit, on this record, Ogando's assertion that he had little or no interim earnings in 2002 and 2003. Nor do I credit the testimony of his friend Angel Diaz.³ Moreover, I conclude that Ogando would have continued to work for Royal Quality General Construction, at a comparable rate of pay, during the first 5 months of 2004 until he was employed by Whole Foods.

In light of the above, I conclude (a) that Ogando's interim earnings for each quarter of 2002, 2003, and the first and second quarters of 2004, exceeded the gross backpay calculations made on his behalf for those years; and/or (b) that for this period of time, Ogando willfully concealed his interim earnings.

I therefore conclude that Ogando's net back pay for 2002, 2003, and the first and second quarters of 2004, is zero. I also conclude that for 2001, his net backpay is \$3400. I therefore amend my calculations and conclude that his net backpay, plus interest is $\$18,514 + \$3400 = \$21,914$.

Dated Washington, D.C., July 16, 2010.

³ This case was originally heard before the sub-prime mortgage crisis became public. Nor was I aware of what has been euphemistically called "liar loans." It may be that the documents submitted by the real estate agent to the bank were forgeries created to insure the approval of the mortgage application. But the record does not show that this was the case. Perhaps Ogando and Diaz would have testified, if the case were reopened, that they participated in a fraudulent scheme with the realtor to obtain money from a bank. But the General Counsel does not think that the hearing should be reopened and no offer of proof was made to show this possibility.